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February 6, 2015

**OVERNIGHT MAIL AND E-MAIL**

Honorable Erin M. Wirth  
Administrative Law Judge  
Federal Maritime Commission  
800 North Capital Street, N. W.  
Washington, D.C. 20573-0001

Re: Docket No. 14-10 - Econocaribe Consolidators, Inc. vs. Amoy International, L. L. C.  
Request to File a Supplemental Response 46 C.F.R. § 502.70 (d)

Dear Judge Wirth:

This letter is submitted in response to the letter of Econocaribe's counsel dated February 5, 2015, in which Econocaribe admits that its Reply contains "new factual allegations" and that it rewrote its Statement of Undisputed Fact, but that such allegations "are all related to Amoy's response." This assertion is belied by the fact that Econocaribe offers a new Statement of purported Undisputed Facts with its Reply, thus altering the asserted grounds for its request for summary judgment. Counsel has never seen an instance where a moving party has rewritten a Statement of Undisputed Facts in a motion for summary judgment and, without consulting with opposing counsel or the Court, offered them as a new Statement of Undisputed Facts in the moving party's Reply.

1. **In violation of 46 C.F.R. §502.70(c), Econocaribe's Reply raises new grounds, presents matters that did not relate to Amoy's response and reargues points made in the opening motion.**

A fundamental premise of the rules of this Court and of the Federal Rules of Civil Procedure is that a motion for summary judgment must be denied if the non-moving party is denied the opportunity to submit facts essential to justify its opposition. See Rule 56(f); Wright v. Holbrook, 794 F.2d 1152, 1156 (6<sup>th</sup> Cir. 1986) ("It is impermissible to mention an issue for the first time in a reply brief, because the appellee had no opportunity to respond.") This premise is reflected in 46 C.F.R. §502.70 ( c), which states, in part, that "[a] reply may not raise new grounds for relief or present matters that do not relate to the response and must not reargue points made in the opening motion."

Amoy believes that Econocaribe's introduction of a purported tariff, an unauthenticated internet printout, and a mischaracterized complaint filed in another action, in its Reply was an impermissible means for Econocaribe to raise new grounds and present new matters not made in its opening motion and thereby depriving Amoy of any meaningful opposition<sup>1</sup>.

Econocaribe introduced at least three new factual grounds in its Reply, matters that did not relate to Amoy's Opposition, as follows:

First, in its Reply, Econocaribe argues that Amoy "claims its business is related to the rubber and plastic industry and it specifically deals in scrap tires," (Reply, pg. 3), is "an experienced use tire dealer," (Reply, pg. 3), is "an experienced used tires and rubber dealer" (Reply, pg. 5) and a "used tire dealer." (Reply, pg. 6.) It also offers a new "Undisputed Fact," no. 29, presented for the first time in its Reply, that "Amoy's business is related to rubber and plastics industry and it specifically deals in tires scrap." If Econocaribe had properly raised this issue in its motion, Econocaribe's conclusory assertions would have been opposed by Amoy and shown to be incorrect.

These claims and new "Undisputed Fact" are based on Econocaribe's Reply Exhibit 2, print-outs from the internet, new proffered evidence for which there was no Request for Judicial Notice or foundation. If a Request for Judicial Notice had been made, Amoy believes that it would have been denied, see Stewart v. Stoller, 2014 WL 1248072 (D. Utah, 2014) ("While courts often take judicial notice of public records available on the Internet [citations], many courts are reluctant to take judicial notice of other kinds of facts on the Internet [citations],"), at \*1, or at least not without giving the parties an "opportunity to be heard prior to the taking of judicial notice of websites." Pickett v. Sheridan Health Center, 664 F3d 632, 648 (7<sup>th</sup> Cir. 2011).

The second new factual ground is Econocaribe's "Undisputed Fact" no. 31, presented for the first time in its Reply. This "new" fact is based on Econocaribe's Reply Exhibit 3, which is another internet print-out for which there was no Request of Judicial Notice. "Undisputed Fact" no. 31 appears to relate to Amoy's attempt to find a buyer. This "Undisputed Fact" misrepresents the internet posting, which Amoy seeks leave to address.

The third new factual ground is Econocaribe's "Undisputed Facts," nos. 32 and 33, presented for the first time in its Reply, in which Econocaribe misrepresents the document submitted by Econocaribe with its Reply and marked as its Exhibit no. 4. These and other new

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<sup>1</sup>Mr. Mooney's argument that new factual allegations were made but no new grounds were asserted is specious. He rests this claim based on Sanders v. U.S., 373 1, 16 (1963), a seminal habeas corpus case in which the "Sanders Test" was developed to identify proper grounds for multiple habeas corpus writs. It has no application here. Furthermore, the fact that Econocaribe has included these new factual allegations in a new Statement of Undisputed Facts reflects that such new factual allegations are asserted by Econocaribe as new grounds supporting its motion.

factual grounds are unrelated to Amoy's Opposition.

Amoy's seeks leave of Court to address them; otherwise, Econocaribe will argue that they were undisputed. Amoy also requests the Court to strike Reply Exhibits nos. 2, 3 and 6 as having been offered without a Request for Judicial Notice and lack of foundation and to strike New Undisputed Facts Nos. 29 and 31 and to ignore any references in the Reply upon which they are based.

Econocaribe also violated §502.70(c) by rearguing points that it made in its motion. Specifically, its New Statement of Undisputed Facts is nothing more than a reargument of the "Undisputed Facts" that it offered in its motion. Amoy views the New Statement as a usurpation of this Court's role in deciding what facts are undisputed. These "Undisputed Facts" are also based on hearsay. See, for example, Econocaribe's New Fact No. 12, where support for that "New Fact" is that "John Kamada has personal knowledge as to what Maersk informed him." Based on the foregoing, Amoy requests the Court strike Econocaribe's New Statement of Undisputed Facts in its entirety.

2. **Amoy served Econocaribe's Counsel with an executed Declaration of Melissa Chen.**

Econocaribe's Counsel was emailed an executed version of the Declaration of Melissa Chen when the Secretary of the Commission was served by email on January 19, 2105 at 6:23 PM. The executed declaration was also overnighted for filing with the Secretary of the Commission. Later, that day, at 6:42 PM, an unexecuted version of the Declaration was inadvertently emailed to the Judges Mailbox, with a copy to Econocaribe's counsel.

In view of the foregoing, Amoy believes that extraordinary circumstances exist under 46 C.F.R. 502.70 (d) for this Court to grant leave to Amoy to submit a Supplemental Response.

Respectfully submitted,

RUSSELL, MIRKOVICH & MORROW



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Amoy International, LLC

Copy: Office of the Secretary (via email)  
Neil Mooney, Esq. (via email)